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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND, TEXAS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Earl R. Deen, of Brown County, Texas, petitioner herein, prays that a writ of certiorari be issued to review the final decree of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, reversing the judgment of a trial court based on findings of fact made by a jury in a Federal Employers' Liability Act case in favor of him, an injured railway employee, and rendering judg-

ment that Deen recover nothing against his employer, Gulf, Colorado and Santa Fe Railway Company (Tr. 75).

I. STATEMENT OF THE MATTER INVOLVED

1. The Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland denied petitioner his right of trial by jury guaranteed by the Constitution and given him by Congress under the Federal Employers' Liability Act (45 U. S. C. A., sec. 51 et seq.) by disregarding all findings of the jury on conflicting evidence favorable to the injured employee, giving full force and effect to all findings of the jury favorable to the railway company, and reading into the verdict a finding that was not made *(275 S. W. 2d 529)*. The Supreme Court of Texas refused an application for writ of error for want of merit, June 29, 1955 (certified copy of order appears in the record), and motion for rehearing of application was overruled April 25, 1956 (certified copy of order in the record). The Court of Appeals is thus the highest court of a state in which a decision could be had within the meaning of 28 U. S. C. A., sec. 1257, as construed by the Honorable Supreme Court of the United States, in

Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. Tex., 74 S. Ct. 396, 347 U. S. 157, 98 L. Ed. 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U. S. 931, 98 L. Ed. 1083;

Michigan-Wisconsin Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U. S. 931, 98 L. Ed. 1083;

Adam v. Saenger, Tex., 58 S. Ct. 28, 302 U. S. 668, 82 L. Ed. 515, gr'g certiorari 101 S. W. 2d 1046, rev. 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, conformed to 119 S. W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511;

Adam v. Saenger, Tex., 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, conformed to Civ. App. 119 S. W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511;

Adam v. Saenger, Tex., 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, den'g rehearing 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rev. 101 S. W. 2d 1046, cert. gr. 58 S. Ct. 28, 302 U. S. 668, 82 L. Ed. 515, conformed to 119 S. W. 2d 687, cert. den. Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511.

2. Petitioner, Earl Deen, worked as a coppersmith in the shops of the Santa Fe Railway at Brownwood, Texas (S. F. 4). He had worked as a coppersmith about eleven years prior to July 12, 1949 (S. F. 4), on which day he sustained an injury in the course of his employment (S .F. 4). On that day a locomotive was in the shops for repair (S. F. 6).

The assistant foreman, Mr. Williams, told him, "I have got to have this engine today" (S. F. 7). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (S. F. 10). The babbitt available was in a cracked pot on the furnace that leaked so badly the molten metal would put out the fire underneath (S. F. 10). Shortly after the assistant foreman, Williams, told Dean the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen in the presence of Mr. Johnson that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace the men on arrival could assist him with the new one (S. F. 8, 96). The old pot weighed 250 pounds and contained solidified babbitt weighing 650 to 700 pounds (S. F. 14). Deen attempted to get the old pot off the furnace alone and to get the babbitt out of the old pot so that he would have everything ready for the new pot and be ready to do his part in melting the babbitt for use on the engine as soon as possible (S. F. 9, 65). A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects (S. F. 8). The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (S. F. 12), containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2-inch rim (S. F. 15) off the brick furnace a height of about an inch (S. F .9) so as to allow the arms of the crane to grip it and lift it from the furnace (S. F. 9). A buggy bar or pinch bar was used by Deen to pry the

pot and babbitt off the furnace so it could be gripped by an available crane (S. F. 9). Deen did this work alone and in the process the pot and babbitt crashed to the concrete floor (S. F. 9). Chance thus selected the spot on the floor where the heavy pot, with its heavier contents, was placed, although Deen testified it dropped just about where he would have set it down (S. F. 58). It fell upright and Deen decided that since babbitt on cooling contracts more than steel, if he could turn the pot over, the babbitt would fall out and be available for the new pot on its briefly anticipated arrival (S. F. 75). He struggled alone to overturn the pot but was unsuccessful (S. F. 14). Earl Snow, a fellow employee, working as an acting blacksmith in the shop nearby, saw Deen's struggle and voluntarily came to his aid (S. F. 15). The two tried to overturn the pot away from them but were not strong enough to do so (S. F. 15). Deen braced himself on the furnace (which was crowded close to the pot) and Snow on the work bench and, by pulling the pot towards them, they were able to raise it slowly to an upright position (S. F. 15), when the babbitt sloughed out of the pot (S. F. 16) very fast (S. F. 126). The babbitt struck the right leg of Deen (S. F. 16), crippling him for life (S. F. 44). The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and the babbitt off the furnace with the crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the

pot back on the furnace (S. F. 62, 75). The gist of the lawsuit, in the opinion of the petitioner, is this: Did the railway company, having provided a crane and hoist for lifting on and off a brick furnace a heavy steel pot, with contents, weighing about half a ton, which in size was a little larger than an army foot-locker, owe a duty to equip the pot with a clamping device so that it could be gripped by the arms of the crane and overturned on the concrete floor so as to empty out its contents, where fellow employees were available to assist in manually overturning the pot? In the opinion of the petitioner, issues of fact are involved here and those issues were correctly submitted to the jury by the trial court. Some issues were answered favorably to petitioner, some favorably to respondent.

The findings of the jury may be summarized as follows:

(1) that the railroad did not furnish Deen proper tools and this was a proximate cause of his injuries;

(2) that the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing babbitt from the melting pot;

(3) that the railroad did not fail to give to plaintiff proper supervision at the time and on the occasion in question;

(4) that Deen was negligent in failing to obtain additional help and this was a proximate cause of his injuries;

(5) that Deen was not negligent in the manner and method that he used in doing the work;

(6) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

(7) that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

(8) that $39,000 will reasonably compensate the plaintiffs for his injuries; and

(9) that plaintiff's own negligence should reduce the recovery $17,550, or 45% (Tr. 60-67).

3. The trial court reconciled the findings of the jury and rendered judgment that the plaintiff recover judgment in the sum of $21,450.00 with interest thereon at the rate of 6% per annum from April 26, 1954, and all costs of court, which is the only judgment that could be rendered without disregarding any of the findings of the jury (Tr. 85). The Texas Court of Civil Appeals set aside the verdict of the jury and the judgment rendered thereon, and rendered judgment that the plaintiff recover nothing *(Opinion, Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, 275 S. W. 2d 529*, copy of which is hereto appended.)

4. Petitioner contends that in reaching this result, the Texas Court ruled contrary to the principles of law announced by this Court in

Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Ellis v. Union Pacific RR. Co., 329 U. S. 649, 67 S. Ct. 598;

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967;

Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465;

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520;

Pauly v. McCarthy, et al., 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 reversing Pauly v. McCarthy, et al., 166 P. 2d 501;

Blair v. Baltimore & Ohio R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692;

Jesionowsky v. Boston & Maine R. R., 329 U. S. 452, 67 S. Ct. 401;

Anderson, Administratrix of the Estate of L. C. Bristow, Dec. v. The Atchison, Topeka and Santa Fe Ry. Co., Cal., 68 S. Ct. 854, 333 U. S. 821, 92 L. Ed. 1108;

Boston & Maine R. R. v. Meech, 156 F. 2d 109 (1 C. C. A. 1946, Cert. Den. October 28, 1946), 329 U. S. 763, 67 S. Ct. 124;

Cogswell v. Chicago & Eastern Ill. RR. Co., 328 U. S. 820, 66 S. Ct. 1122, 90 L. Ed. 945 reversing Cogswell v. Chicago & E. I. Rr. Co. (C. C. A. 7th), 153 F. 2d 94.

II. JURISDICTION

1. Jurisdiction to grant this Petition is sustained by Title 28 U. S. C. A., section 1257, sub-section (3). (June 25, 1948, c. 646, 62 Stat. 929.)

2. The Statutes of the United States applied by the Court of Civil Appeals of Texas are 45 U. S. C. A., Sections 51-59 (35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404).

3. The judgment of the Court of Civil Appeals of Texas was rendered February 4, 1955, rehearing denied February 25, 1955, as shown by the opinion reported in *275 S. W. 2d 529*, copy of which is hereto appended.

4. As shown above, the Court of Civil Appeals is the highest court of the state in which a decision could be had within the meaning of 28 U. S. C. A., section 1257. Application for writ of error to the Supreme Court of Texas was refused, no reversible error, June 29, 1955, and motion for rehearing of application was overruled April 25, 1956. (Certified copies of both orders are included in the transcript which accompanies this application.)

III. QUESTION PRESENTED

The question presented is whether the Court of Civil Appeals of Texas in sustaining all issues of a jury in favor of the railway and disregarding all issues found by a jury in favor of the injured employee, and by reading into a verdict something that is not there, and in setting aside a judgment of a trial court rendered in favor of the injured employee on the verdict of the jury, has deprived the in-

jured employee of the right of trial by jury given him under a Federal Statute generally known as the Federal Employers' Liability Act.

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The jury found in favor of Deen:

1. the railroad did not furnish Deen proper tools and this was a proximate cause of his injuries;

2. Deen was not negligent in the manner and method that he used in doing the work;

3. the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;

4. that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

5. that $39,000 will reasonably compensate the plaintiff for his injuries; and

6. plaintiff's own negligence should reduce the recovery $17,500, or 45%. (Tr. 60-67.)

The evidence was conflicting on all these issues. The jury weighed the evidence and decided against the railway company on these issues, and the trial court accepted the verdict and rendered judgment in favor of the plaintiff. The Court of Civil Appeals found there was no evidence to support the above verdict and set the verdict of the jury and the judgment of the trial court aside.

The jury also found:

1. the railroad did not fail to furnish one or more additional men other than Snow to assist plaintiff in removing the babbitt from the melting pot;
2. the railroad did not fail to give plaintiff proper supervision at the time and on the occasion in question; and
3. Deen was negligent in failing to obtain additional help, and this was a proximate cause of his injuries.

The evidence was conflicting on all these issues. The jury weighed the evidence and decided against Deen, the injured employee, on these issues, and the trial court accepted the verdict and took the above issues into consideration in reducing the amount of damages Deen sustained in the course of his employment and in rendering judgment for the reduced amount in accordance with the verdict of the jury. The Court of Civil Appeals found ample evidence in the record to support these findings of the jury in favor of the railroad company. Isn't it remarkable that the jury in this case properly weighed the evidence when it made findings in favor of the railway company but improperly weighed the evidence when it made findings in favor of the injured employee? It is submitted that the Court of Civil Appeals, in disregarding all findings of the jury in favor of the injured employee, and in giving full force and credit to all findings of the jury favorable to the railway company, and in reading into the verdict something that was not there, has deprived the petitioner of his right of trial by jury given him by the Congress under the Federal Employers' Liability Act.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

On page 5 of this Application, petitioner has described the method used by the railway company in lifting a 250-pound steel pot containing 650 to 700 pounds of babbitt from a furnace. It was petitioner's position in the trial and the appellate court that the pot should be so equipped with clamps that it could be gripped by the arms of an available crane which was used to lift it off the furnace so that it could be overturned on the floor and its contents emptied (S. F. 5). The petitioner, who worked with the pot day in and day out, said this should have been done (S. F. 100). Earl Snow, a fellow employee and acting blacksmith, testified the pot was not equipped to be handled with the hoist (S. F. 116). He testified I-bolts could be fixed in the pot to fasten the hoist to and that he could have made such attachments in the blacksmith shop (S. F. 116). Deen, the petitioner, testified that if the crane could have gripped the pot, he could have tilted the pot and contents over with one finger and that he could have tilted the pot away from him so that the babbitt would have fallen on the floor and not on him (S. F. 88). In lifting the pot and contents with the crane from the furnace, it had slipped and fallen from the hoist (S. F .9). The foreman and assistant foreman, on a number of times, knew the pot was being lifted off the furnace and the contents emptied, and they had not made any attempt, or said anything about making a tool to handle it (S. F. 89). On the day of the injury, July 12, 1949 (S. F. 4), a locomotive was in the shops for repair

(S. F. 6). The assistant foreman, Mr. Williams, told Deen, "I have got to have this engine today" (S. F. 7). Babbitt, an alloy of antimony, copper and tin, was necessary for these repairs (S. F. 10). The babbitt available was in the steel pot on the furnace (S. F. 10). Shortly after the assistant foreman, Williams, told Deen the locomotive had to be out that day, W. J. Bettis, clerk to the general foreman, Johnson, told Deen, in the presence of Mr. Johnson, that his new babbitt pot had arrived at the freight depot, that men from the store department had gone for it and if he had the old one off the furnace, the men on arrival could assist with the new one (S. F. 8, 96).

The railway company offered no evidence at all.

The trial court considered the above evidence and other evidence in the record sufficient to raise issues of fact with respect to the negligence of the railway company's failure to furnish proper tools to the employee, particularly since the railway company offered no evidence, and the jury weighed the evidence and found: (1) the defendant failed to furnish plaintiff with proper tools to remove the babbitt from the melting pot; (2) that such failure was negligence, and (3) that such failure was a proximate cause of plaintiff's injuries (Tr. 75, 76). On such findings of negligence, the trial court rendered judgment for the plaintiff, after reducing the amount of the recovery on account of plaintiff's negligence because of other findings of the jury as is provided in the Federal Employers' Liability Act (Tr. 81).

Texas Courts have emphasized the point over a long period of years that when the proof tends to establish a certain fact and establishes that it is within the power of the opposing party to disprove it, if false, the silence of the opposing party has a certain probative force.

Pullman Palace Car Co. v. Nelson
(Court of Civil Appeals of Texas),
54 S. W. 624—

> "When the proof tends to establish a fact, and at the same discloses that it is within the power and to the interest of the opposing party to disprove it, if false, the silence of the opposing party not only strengthens the probative force of the affirmative proof, but of itself is clothed with a certain probative force."

The same rule was applied in a suit under the Federal Employers' Liability Act for damages arising from the death of an employee in the course of his employment, by the Honorable Court of Appeals at Texarkana, in

Texas & Pacific Railway Co. v. Riley,
183 S. W. 2d 991, 994, writ of error refused,
certiorari denied, 65 S. Ct. 1414,
325 U. S. 873, 89 L. Ed. 891,

where the Appellate Court, in passing on the sufficiency of the evidence to support the findings of the jury, made this comment:

> "Moreover, these circumstances are materially strengthened by the failure of appellant to offer any explanation of the occurrence resulting in Riley's death which would excuse it."

That a pot with its contents weighing almost half a ton should be so equipped that it could be overturned by an available crane seems so reasonable and practical and of such common knowledge that the Court, even in the absence of any proof at all, should take judicial knowledge of the proposed method. The Court of Civil Appeals at Texarkana, in

Swann v. T. & P. Ry. Co.,
200 S. W. 1131,

says:

> "The existence of hoisting machinery which may be employed for lifting heavy weights is a matter of such common knowledge that evidence to that effect was not required."

The Court of Civil Appeals of Texas, in the *Deen* case, found there was no evidence to support the above findings of the jury, and set aside such findings and the judgment of the trial court rendered thereon. The Court of Civil Appeals not only disregarded the above findings of the jury but also disregarded other findings in favor of the plaintiff which were as follows:

> (1) that Deen was not negligent in the manner and method that he used in doing the work;
>
> (2) that the railway company could reasonably anticipate that Deen would do the job in the way and manner that he did;
>
> (3) that the sole proximate cause of plaintiff's injuries was not due to his own acts and conduct;

(4) that $39,000 will reasonably compensate the plaintiff for his injuries, and

(5) that plaintiff's own negligence should reduce the recovery $17,500, or 45% (Tr. 60-67).

To get around the verdict of the jury as above reported, the Court of Civil Appeals resorted to certain devices:

(1) Instead of construing plaintiff's pleadings liberally and so as to uphold the verdict of the jury, it seized upon certain clauses in plaintiff's pleading to hold that under the pleading of the plaintiff, the plaintiff must prove that the railway furnished neither adequate tools nor sufficient help to do the work, and since the jury found sufficient help was available, the plaintiff had failed to prove his case (275 S. W. 2d 529, 536). Among other things, plaintiff pled the injuries herein set forth resulting to the plaintiff were the direct and proximate result, jointly and severally, of the negligent acts of the defendant in the following particulars:

"A. .....

B. .....

C. That the defendant was negligent in not furnishing plaintiff with proper tools, as herein described, to remove said babbitt;

D. That defendant was negligent in not furnishing at least two additional men to assist plaintiff in removing the babbitt from said pot." (Tr. 7.)

Petitioner states a fair construction of his pleading does not warrant the construction of the appellate court that since plaintiff pled inadequate tools and the non-availability of additional help as alternate causes of plaintiff's injuries, plaintiff must prove both causes in order to succeed; plaintiff's pleading as a

whole show allegations of several acts of negligence; contrary to the finding of the appellate court, the case was not submitted to the jury on the basis that plaintiff must prove two acts of negligence to prevail.

(2) The appellate court found each finding of the jury in favor of the railway company amply supported by the evidence, while each finding of the jury in favor of the injured employee had no evidence to support it;

(3) The appellate court read into the verdict of the jury a finding that was not there, to-wit: that the railway company had provided Deen a safe method to do his work and was under no duty to provide him more than one safe method. The jury did find (a) the railroad did not fail to furnish one or more additional men, other than Snow, to assist plaintiff in removing the babbitt from the meling pot, and (b) that Deen was negligent in failing to obtain additional help, and this was a proximate cause of his injuries (Tr. 60-67).

The jury was not asked and was not given an opportunity to find whether with additional help Deen could have done his work safely. Indeed, it was the contention of the railway company in the trial court that the accident would have happened anyway despite the number of helpers present. The cross-examination of Deen by the railway attorney developed the following evidence:

> "Q. And the strain in getting it (the melting pot) up was over before it (the babbitt) fell on your foot?
>
> "A. (Deen) Yes, sir.
>
> "Q. As a matter of fact, these extra men would have been helpful to you only in getting it upright; is that right, Mr. Deen?
>
> "A. Yes, sir.

"Q. And whether there had been five or ten men there would not have had anything to do with the babbitt falling out of the pot?

"A. No, sir.

"Q. It would have fallen out if the whole shop had been there with you?

"A. It might have fell on two of us." (S. F. 77.)

In its Motion for an Instructed Verdict, respondent urged "it is undisputed that as far as the accident itself is concerned, additional employees could not and would not have prevented this happening." (Paragraph V, Defendant's Motion for an Instructed Verdict, Tr. 23.) In his objections to the court's charge the defendant again advances his theory that the absence of additional men had nothing to do with the accident:

> "Defendant objections (objects) and excepts to special issue No. 6 for the reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries." (Paragraph VIII, Defendant's Objections to the Court's Charge, Tr. 35.)

The appellate court in its construction of the evidence is more favorable to the railway company than the railway company is to itself. Isn't it a travesty on justice that Deen is told by the appellate court to limp through life without any compensation because of a fact that the railway company says had nothing to do with the accident?

(4) The strictness with which the appellate court construed plaintiff's pleading in order to reach the conclusion that plaintiff assumed the burden of proving both inadequate tools and inadequate help is equalled only by the liberality of the appellate court in construing the railway company's pleadings in or-

der to attempt to justify a judgment for the railway company. As pointed out above, at no time did the railway company contend that the failure of the plaintiff to use available help was the proximate cause of plaintiff's injuries. The defendant pled the failure of the plaintiff to obtain additional help constituted contributory negligence: "* * * that the plaintiff did not ask for additional help * * * and that if there was any negligence in the method used * * * or the amount of help used * * * it was the plaintiff's negligence and proximately contributed to his alleged injuries." (Tr. 10-11.) That is a plea of contributory negligence. The jury reduced the amount of the plaintiff's recovery 45% or $17,500 because of the contributory negligence of the plaintiff (Tr. 60-67). The railway company by its pleadings and evidence did not contend that plaintiff's failure to use available help was the sole proximate cause of his injuries. In fact, after the trial court had prepared issues bearing on plaintiff's failure to use additional help, at the request of the railway company, the court submitted an issue to the jury as to whether the sole proximate cause of plaintiff's injuries was not due to his own acts and misconduct, to which the jury answered: "It was not the sole proximate cause of his injuries." (Tr. 65.) The defendant pled the failure of Deen to use available help was contributory negligence, the jury found that such failure was negligence on the part of Deen but showed it considered such negligence as contributory by reducing the amount of the recovery and by finding that such negligence was not the sole proximate cause of the accident. The Court of Civil Appeals ignored the finding of the jury on the sole proximate cause issue, ignored the verdict of the jury reducing plaintiff's recovery because of his own negligence, and construed plaintiff's negligence in failing to obtain additional help as the sole proximate cause of his injuries—despite the fact that defendant only pled plaintiff's failure to use available help as contributory negligence.

Even if the jury's findings amount to a finding that with available help Deen could have done the job safely, which they do not, nevertheless the plaintiff was entitled to judgment. This very question was before the Supreme Court of the United States, in

> Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co., 93 L. Ed. 497, 336 U. S. 53.

In this case the employee of the railroad was injured by a fall while walking over a pit on a narrow plank which he contended was not firmly set and was oily. The railroad admitted the accident occurred in the manner stated but denied negligence. The evidence showed that the company had not forbidden its employees to use the plank but had put chains on posts around it. One narrow place was left where an employee could squeeze through and use the plank. The trial court instructed a verdict for the defendant and this was affirmed by the Supreme Court of Utah. The court held the posts and chains were the equivalent of an order not to use the plank. The Supreme Court of the United States granted a writ of certiorari and reversed the case. In its opinion the Supreme Court again reiterated that courts must not deprive the employee of the right of trial by jury in these cases and in the course of its opinion said:

> "While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict."

The court continues:

> "There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was

> 'in part' the result of respondents' negligence. For while petitioner's failure to use a safe method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee'."

The same point was before the United States Court of Appeals, 4th Circuit, in

Va. Ry. Co. v. Viars, 193 F. 2d 547.

Here the railway employee was electrocuted while exploding dynamite. The court said:

> "It is said, also, that because the plaintiff might have used a fuse with the dynamite, instead of the electric equipment, or might have used picks and shovels without dynamite, even though it might have taken longer, he elected to use a dangerous rather than a safe method of doing his work and is thereby precluded from recovery. There was evidence, however, that the use of fuses in exploding the dynamite was more dangerous than the use of electrical equipment; and, on the evidence of plaintiff, the picks and shovels had been tried without success. If, however, plaintiff adopted a dangerous way of doing the work, when a safe one was open to him, this amounted to nothing more than assumption of risk or contributory negligence, neither of which excuses defendant's negligence or bars recovery under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. If plaintiff was guilty of negligence in using the dynamite, this did not bar him of recovery, if defendant was also guilty of negligence which contributed

> to his injury but went merely to the reduction of damages. This aspect of the case was fairly presented by the trial judge in his charge to the jury."

Petitioner submits the Supreme Court's holding in the *Wilkerson* case, supra, is controlling even if the jury's findings are given the forced and unreasonable construction that they amount to findings the railway provided the plaintiff a safe method of doing his work.

The decisions of the Honorable Supreme Court of the United States insisting that verdicts of jury be not taken away from employees in cases arising under the Federal Employers' Liability Act (45 U. S. C. A. 52) by appellate courts have not received a friendly reception in Texas. The Honorable Court of Civil Appeals in this case made no reference to any of the numerous decisions of the Supreme Court of the United States dealing with the right of trial by jury in Federal Employers' Liability cases. If Texas appellate courts can get around an Act of Congress giving an injured employee a jury trial and the numerous decisions of the Supreme Court of the United States liberally construing this right in favor of the injured workman by such devices as (1) saying there is no evidence to support any findings in favor of the injured employee but ample evidence to support all findings in favor of the railway company; (2) by reading into jury verdicts something that is not there, and (3) by strictly construing pleadings against the injured employee, while liberally construing pleadings in favor of the railway company, then the Act of Congress and the numerous decisions of the Supreme Court

of the United States amount to nothing so far as injured employees in Texas are concerned. The Supreme Court of Texas refused a writ of error in this case and wrote no opinion in this case. In the case of *Port Terminal Railroad Association v. Oliver Ross, 289 S. W. 2d 220*, the Supreme Court of Texas referred to the *Deen* case and supported the action of the Court of Civil Appeals at Eastland, Texas, in circumventing the verdict of the jury, and encouraged all appellate courts in Texas to disregard the decisions of the United States Supreme Court in Federal Employers' Liability cases in these words:

> "The petitioner in the Deen case argues, as does the plaintiff in the present case, that under the Federal Employers' Liability Act as interpreted and applied by the Supreme Court of the United States, the question of the carrier's negligence is for the jury, and that the trial or appellate court cannot substitute its judgment for that of the jury. The opinion in Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, states that a railroad employee will be deprived of a goodly portion of the relief which Congress has afforded him if he is denied a jury trial in a close or doubtful case. And it has been stated that the Supreme Court of the United States is paying lip service to the doctrine that liability in these cases is based only upon fault, but that its standard of fault is such as to indicate that the principle is without much practical meaning. See dissenting opinion of Mr. Justice Jackson in Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.
>
> "In an action under the Federal Employers' Liability Act, the question of what constitutes negligence, and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable

federal decisions. The decisions of the Supreme Court which are cited by the parties represent only that Court's appraisal of the facts there involved, and are of little assistance in the determination of cases which are not factually analogous. So long as that Court continues to pay even lip service to the principle that liability of the railroad employer is based only upon negligence, it is incumbent upon the state courts to recognize and apply the principle in cases presented for their determination. Until required to do so by a clear and positive declaration of the highest federal tribunal, our trial and appellate courts cannot and should not give effect to a jury finding of negligence when in its opinion the record is completely devoid of evidence in support of same."

Petition for writ of error in the *Deen* case was filed in the Supreme Court of Texas, March 28, 1955. It was finally overruled April 25, 1956. It took the Supreme Court of Texas one year and one month to decide that the record was completely devoid of any evidence to support any findings of the jury in favor of Deen. In 1928, in a case not arising under the Federal Employers' Liability Act, styled *Galveston H. & S. A. Ry. Co. v. Brewer, 4 S. W. 2d 320*, the Supreme Court of Texas expressed its approval of a decision by the Court of Civil Appeals, by denying a writ of error, upholding a jury verdict in a Master and Servant case where the evidence was strikingly similar to the evidence in the *Deen* case. That case also involved an injured railway employee. That injured intrastate railway employee, in 1928, received more liberal treatment from the appellate courts in Texas than Deen received in 1956, despite the liberal amendments to the Federal Employers'

Liability Act and despite the liberal construction of that Act by the Honorable Supreme Court of the United States.

VI. CONCLUSION

It is respectfully submitted that the opinion of the Court of Civil Appeals of Texas, in this case, is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act; that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the Court of Civil Appeals of Texas, and finally reverse that judgment and render judgment in favor of petitioner and in accordance with the verdict of the jury, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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June 23, 1956

I certify that a copy of the foregoing petition for writ of certiorari has been mailed, on the 23rd day of June, 1956, to the respondent's attorneys, as follows: to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas, and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

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ROBERT LEE GUTHRIE.

APPENDIX

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,

v.

Earl R. DEEN, Appellee.

No. 3135.

Court of Civil Appeals of Texas.

Eastland.

Feb. 4, 1955.

Rehearing Denied Feb. 25, 1955.

Employee's action against railroad under Federal Employers' Liability Act for personal injuries inflicted by falling babbitt. The District Court, Brown County, A. O. Newman, J., gave judgment for employee. Railroad appealed. The Court of Civil Appeals, Grissom, C. J., held that where employee admitted that if he had obtained additional assistance babbitt pot could have been emptied safely, and jury found employee negligent in not obtaining additional assistance, employee could not recover.

Judgment reversed and rendered for railroad.

1. Master and Servant—Key No. 104

If babbitt that fell and injured employee could have been emptied from babbitt pot safely if employee had obtained additional men to help him, railroad had furnished one reasonably safe way to empty pot, and had no duty to furnish a second reasonably safe way by supplying employee proper tools for the job. Federal Employers' Liability Act, § 3, 45 U. S. C. A. § 53.

2. Master and Servant—Key No. 236(4)

Where employee injured by falling babbitt admitted that if he had obtained additional assistance babbitt pot could have been emptied safely, and jury found employee negligent in not obtaining additional assistance, employee could not recover, even if railroad was guilty of negligence in failing to furnish proper tools so employee could do work alone.

3. Appeal and Error—Key No. 1175(5)

Exceptions to rule providing for rendition of judgment by appellate court on reversal were not applicable, in employee's action for personal injuries under Federal Employers' Liability Act, to record, which disclosed that employee alone was guilty of negligence, and the Court of Civil Appeals on reversal rendered judgment trial court should have rendered. Rules of Civil Procedure, rule 434.

Woodruff & Holloway, Brownwood, Hudson, Keltner & Sarsgard, Ft. Worth, for appellant.

McCord, Durant & Witts, Robert Lee Guthrie, Dallas, for appellee.

GRISSOM, Chief Justice.

On July 12, 1949, Earl R. Deen had his leg broken by babbitt falling from a melting pot and he sued his employer, the Gulf, Colorado & Santa Fe Railway Company, for damages under the Federal Employers' Liability Act. See 45 U. S. C. A. § 53. Deen had then been employed by said company as a coppersmith in its roundhouse in Brownwood for eleven years. The company kept there a babbitt melting pot which had cracked and was no longer usable. The railway company had ordered a new pot. On the morning of July 12th, Deen's foreman advised him there was an engine in the roundhouse which had to be repaired that day. Deen was working on said engine when the clerk of said company's store department told him the new pot was on the way to the roundhouse from the depot. Deen left the engine, moved the old pot to the floor and was attempting alone to dump the babbitt out of the pot when a blacksmith, Snow, saw Deen and volunteered to help. Snow and Deen tried to dump the pot "away" from them but it was too heavy to tilt the pot forward without more help and they then pulled the pot toward them and the babbitt fell forward from the pot and broke Deen's leg. Deen did not ask for any help. Three times within the preceding [530] three weeks, Deen, with the assistance of sufficient help, had manually re-

moved the babbitt without anyone being injured. There were about sixty other men employed in Deen's department of the railway shop. His employers were not advised that he was then going to do such work, nor how he proposed to do it, but Deen voluntarily attempted to do it alone and then, after Snow volunteered, he proceeded to remove the babbitt with only the assistance of Snow.

Deen alleged it was necessary, if said engine was to be repaired that day, that there be no delay in installing the new melting pot and that it was his duty to get the old pot off the furnace and remove the babbitt; that he moved the pot from the furnace to the floor; that the pot weighed about 250 pounds and the babbitt and pot together weighed about 800 pounds; that to get the babbitt out of the pot it was necessary to raise the pot on its edge so the babbitt would fall out; that the railway company knew, or should have known, that the old pot had to be moved and the babbitt taken out and, therefore, it was its duty to furnish Deen with proper tools with which to take the babbitt out of the old pot, or to furnish "*sufficient help to remove such babbitt without the use of tools*"; that Deen knew the babbitt could not be removed without tools to grasp the pot and give sufficient leverage to turn the pot over, or "*that he have sufficient help to tip the edge of said pot over and turn the same in the direction away from the plaintiff*"; that plaintiff procured the help of one man, Snow, to turn said pot over and dump the babbitt; that they attempted to turn the pot over by raising it on its edge and tilting it "*away from them*" but, because of its weight, they could

not do so; "*that because of the lack of sufficient help or sufficient tools*, it then became necessary for the plaintiff and the said Snow to grasp said pot upon its edge and pull same *towards them* in order to turn the same over"; that when they tilted the pot toward them the babbitt fell toward Deen and struck his leg. "*That had the plaintiff had sufficient help, to-wit: at least two other persons, to assist in turning said pot over, the same could have been done by lifting the same and turning it over away from the said plaintiff and the said Snow, but because of the negligence of the defendant in failing to furnish sufficient help or sufficient tools*" Deen was injured. (Emphasis ours.) Defendant answered, among other things, that Deen decided when and how this should be done and that he acted without instruction as to how it should be done; that Deen did not ask for additional help nor for instructions; that the method used was decided by Deen alone and, if there was negligence in the amount of help used or the manner in which the work was done, said matters were determined solely by Deen and his injury was the result of his own negligence.

A jury found (1) the railway company failed to furnish Deen with proper tools to remove the babbitt and (2) that such failure was negligence and (3) a proximate cause of Deen's injury; that (4) defendant did not fail to furnish one or more men, in addition to Snow, to assist Deen in removing the babbitt from the melting pot; and (7) the railway company did not fail to give Deen proper supervision; that (10) Deen was negligent in failing to obtain

additional help to do the work he was doing when he was injured and that (11) Deen's said negligence was a proximate cause of his injury. The jury found that (13) Deen was not negligent in the manner and method used in doing the work; that (15) the railway company and its supervisory employees should have reasonably anticipated that Deen would perform the work which caused his injuries in the way and manner in which he did; that (16) the sole proximate cause of Deen's injury was not "due to" his acts and conduct; that (17) $39,000 would compensate Deen for his injuries but that (18) said amount should be reduced 45%, or $17,550, by reason of Deen's negligence. Judgment was rendered on said verdict awarding Deen $21,450 and the railway company has appealed.

The principal question presented is whether there was evidence to sustain the finding that the railway company was [531] negligent in failing to furnish Deen with tools to remove the babbitt from the melting pot. Deen was furnished a revolving hoist and chains with hooks which he used to move the melting pot from the furnace to the concrete floor. His injury was caused by the falling of the babbitt from the pot while he and Snow were trying to get the babbitt out by tilting the pot "toward" them, instead of "away from" them, after the pot had been moved from the furnace to the floor. Appellant contends it had no duty to furnish more than one reasonably safe way to do the job; that the babbitt could have been removed with reasonable safety by the use of the additional help available and that the jury's findings and the undisputed evidence so show.

The melting pot was described by Deen as being about nine to ten inches deep, forty inches long and twenty-two inches wide. It was slightly wider at the top than the bottom. It resembled a kitchen sink. The pot weighed about 250 pounds and it and the babbitt therein weighed about 800 pounds. The pot had an outside rim around its top 1½ to 2 inches wide.

Deen's complaint was, in substance, that it was the company's duty to do one of two things, either furnish tools or additional help to remove the babbitt. Deen seems to recognize in his pleadings the correctness of appellant's proposition that the company did not have a duty to furnish more than one reasonably safe way to do the work.

[1] We shall now attempt to determine the correctness of appellant's contention that the verdict and the undisputed evidence show that the babbitt could have been removed with reasonable safety with the additional help available to Deen. If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools. In other words, if there was no need for tools the railway company had no duty to furnish them. Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 979; Louisville & N. R. Co. v. Davis, 6 Cir., 75 F. 2d 849; August v. Texas & N. O. R. Co., Tex. Civ. App., 265 S. W. 2d 148, 153 (RNER); Armstrong v. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ. App., 233 S. W. 2d 942, 946 (RNRE); Wolfe v. Henwood, 8 Cir., 162 F. 2d 998, 1000; Fore v.

Southern Ry. Co., 4 Cir., 178 F. 2d 349, 351; McGivern v. Northern Pac. Ry. Co., 8 Cir., 132 F. 2d 213, 217; Thomson v. Pennsylvania R. Co., 6 Cir., 88 F. 2d 148, 150; Johnson v. Pulliam, Tex. Civ. App., 161 S. W. 2d 589 (RWM).

As heretofore shown, the jury found the railway company did not fail to furnish more men to assist Deen in removing the babbitt; that it did not fail to give Deen proper supervision at the time of his injury; that Deen was negligent in failing to obtain additional help to remove the babbitt and that such negligence was a proximate cause of his injury. We think said answers, considered in connection with the record, must be construed as a finding that sufficient men were available to help Deen remove the babbitt with safety. If it does not include a finding that the babbitt could have been thus removed with reasonable safety, we need only to further determine whether the record shows that if Deen had used sufficient help the babbitt could have been manually removed with reasonable safety. It is undisputed that several times recently before Deen's injury, he, with sufficient help, had manually removed the babbitt without injury. Deen pleaded that it was the company's duty to either furnish tools or additional help and the jury found that additional help was furnished and Deen was negligent in not using it. It is shown by Deen's testimony that if the babbitt could have been emptied by turning the pot away from, instead of toward, the men doing the work it could have been manually done with safety. The record shows that with sufficient help the babbitt could have been manually removed from the pot

with reasonable safety by tilting the pot away from the men doing the work. The testimony of Deen and his witnesses are conclusive on this question. The following testimony of [532] Deen and his witnesses show the situation existing when Deen was injured and requires said conclusion. Mr. Deen testified:

> "A. Mr. Earl Snow, who was working at a blacksmith job—came over and said, 'Maybe I can give you a lift' or in some way he remarked that maybe he could help me, and I said, 'Well, lets see if we can turn it over away from us' and we tried to turn it *away from us*, but we couldn't. And I said, 'Well, maybe we can pull it *toward us*, if we can brace ourselves, you can brace there on the work bench, or work table that we have here, and I will brace on the furnace,' and so we braced ourselves, tried it and gradually came up with it; but it was very slow because we were over-powered to start with, but we managed to get it up about straight, on its side, and I wouldn't say that I did, but one of us remarked—I think that I was the one that mentioned it to look out that thing sure would mash your toe.
>
> * * * * *
>
> "Q. *Could it have been turned away from you if you had* had more man power? A. *I don't see why it couldn't.*
>
> "Q. How many additional men would you say it would take? A. How many—
>
> "Q. *How many additional men to turn that pot by lifting it away from you?* A. *One good man, anyhow.*
>
> * * * * *
>
> "Q. Now, all right, on this particular occasion, did you request any help in lifting this pot? A. No, sir.
>
> * * * * *

"Q. Well, from the time you first noticed—I am not talking about the time of your last batch, but from the time you first got it cracked until the time you got hurt, it had been some two or three weeks, had it not?

A. Yes, sir.

"Q. During that time, you and others had taken it out of there—out of the furnace, on the ground there, and taken the babbitt out, and brazed it, one or more times? A. Yes, sir.

"Q. About three times, wasn't it? A. Yes, sir.

* * * * *

"Q. Now, Earl, I will ask you if that pot, babbitt pot, and the removal of it was your job? A. Yes, sir.

"Q. And, were you a full rated man, getting the maximum rate for your job? A. Yes, sir.

"Q. In doing the work out there, I will ask if you or any full rated man was expected to know pretty well how to do the job? A. Yes, sir.

"Q. All right. As far as getting that pot out, who was in charge of that? A. I was.

"Q. Did the foreman tell you to take the pot out?

A. No, sir.

* * * * *

"Q. All right, but any way, as far as this particular job was concerned you were just told by the clerk,—Mr. Bettis, I believe it is? A. Yes, sir.

"Q. That it was—or that the new pot had come in?

A. Yes, sir.

"Q. And that they—the Store Department had gone after it in a truck? A. Yes, sir.

"Q. And nobody told you, none of the supervising employees, Williams or Johnson, or anybody else, told you how to do that job, did they? A. No, sir.

"Q. Whose responsibility was it to do the job? A. Mine.

"Q. Who decided it was going to be done at that particular time? A. I did.

"Q. Who decided as to whether you were going to do it by yourself or to go ask for help? A. I did.
[533] "Q. There were men around there that could have been found to help you, weren't there? A. I suppose they could, but I had asked so many times and they hadn't been.

* * * * *

"Q. All right, next question: 'Well, did you go and ask him for some help? Answer: 'No, sir.' Did you say that? A. I did.

"Q. Question: 'There were men working there that you could have had assigned to help you, were there not? And you answered 'Yes, sir?' A. Yes, sir.

"Q. Did you say that? A. Yes, sir.

"Q. Is that true? A. Yes, sir.

"Q. Next question: 'And you did not ask for more help?' Answer: 'Not on that particular job, no sir.' Was that your answer? A. That's right.

"Q. Next question: 'You had not discussed that particular job with the foreman at all?' Answer: 'No, sir.' Did you say that? A. Yes, sir.

"Q. And was that true? A. Yes, sir.

"Q. All right. Then 'There were some men reasonably close the foreman could have assigned to help you?' A. Yes, sir, but I don't know whether he would or not.

"Q. Anyway, you didn't ask him and have him refuse? A. No, sir.

"Q. Now, getting back to getting that pot out, I think you had taken it out about three times before in the past two or three weeks, had you not? A. Something like that.

"Q. You knew how to handle that job, didn't you, Earl? A. I thought I did.

"Q. Was there any one out there that knew more about it than you did, or who had taken it out more times than you had? A. No, sir.

* * * * *

"Q. All right; let's just take them one at a time: The decision as to when to take it out; who made that decision? A. I did.

* * * * *

"Q. All right, now, Earl, if I misquote you, please tell me; as to getting that babbitt, so far as that is concerned, you might have been able to break it with a sledge hammer or some other way, but *you figured that the safest way was to turn it over.* A. *That's right.*

"Q. All right; whose decision was that? A. I don't remember, but as well as I remember, we both talked about it.

"Q. Who talked about it? A. Me and Earl Snow.

"Q. Well, Earl, who was in charge of removing that pot and babbitt, you or Earl Snow? A. I was.

"Q. Well, anyway, *you agree that is the best way to do it, don't you Earl?* A. *Yes, sir.*

"Q. All right. Now, incidentally, after you got that old babbitt pot out, the furnace was empty where you could put the new one in it, wasn't it? A. Yes, sir.

"Q. There wasn't any hurry about getting the babbitt out of the old pot right then, was there? A. Noth-

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ing more than it had to come out, if the engine was got out that day.

* * * * *

"Q. Are you telling this jury right now—if you don't know, tell me your don't know; but are you telling this jury right now there was not plenty of babbitt out there besides what was in that pot on that day?

A. I don't know that there was.

[534] "Q. Well, you don't know whether there was or wasn't, Earl, is this just about the truth, you were going to have to do it sooner or later, and you were there waiting on the truck, and you just decided to do it then? A. That's right.

"Q. All right, now, whose decision was that? A. Mine.

"Q. The foreman did not tell you to do that at that time? A. No.

* * * * *

"Q. So, turning it over is what you had done on the other occasions to get the babbitt out? A. That's right.

"Q. All right. And the pot weighed the same, didn't it? A. Yes, sir.

"Q. And the—was there ever that much babbitt in it before? A. Yes, sir.

"Q. All right. How many men did it take to turn it over the other times? A. Four or five, or five or six ahold of it; I have had as many as six ahold of it.

"Q. Did anybody know that any better than Earl Deen? A. No, sir; I don't suppose they did.

"Q. And on the other occasions, during the past two or three weeks, when you changed it out, you had as many as five or six men helping you? A. Yes, sir.

"Q. All right. Nobody refused to let them help you, did they, Mr. Deen? A. No, sir; I caught them when they was right there available, and I asked them and they helped.

* * * * *

"Q. There wasn't anything wrong with that operation out there that day, outside of your foot being in the way when that babbitt fell out? A. So far as I know.

"Q. There wasn't? A. That's right.

* * * * *

"Q. Now, Mr. Deen, with reference to lifting this pot the way that you did, you did demonstrate to the jury the way you and Mr. Snow *got in front* of it and braced yourself with one hand and *pulled it toward you?* A. Yes, sir.

"Q. Was there any other way to lift that pot and to turn it that way, that is, for two men to do it other than that way? A. *Two men was over-loaded* in doing that and we had tried before to turn it *away from us* for safety measures.

"Q. And is that why you had to get in front of it? A. That's true with only two of us were able to pull more than we was able to lift and push.

* * * * *

"Q. Question 77: But *you knew that you would get help sooner or later to get it down.* And you answered: 'Yes, sir.' Did you make that answer? A. Yes, sir.

"Q. Was that true? A. Yes, sir.

"Q. *You did know that you would get help sooner or later?* A. Yes, sir.

"Q. In other words, you knew that they were not going to let this furnace be shut down indefinitely

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waiting to get the new pot installed? Answer: 'They never have, but sometimes it looked like we was going to have to go to town and get help' did you answer that? A. Yes, sir.

"Q. Next question: What I am getting at is this: If you had not done it at that particular hour or minute, and let the pot go up to the warehouse, you would still have had to go through the same procedure, that is, you would still have had to take the old pot out and put the new one in, and you answered: 'Yes, sir' did you make that answer? A. Yes, sir.

"Q. Did you say that. A. I sure did.
[535] "Q. In other words, it would have meant a few minutes, or the difference would have been the delay in getting help; is that right? A. Yes, sir.

* * * * *

"Q. When I asked you about designing something, all that you could think of was the clamps and that would be dangerous, wasn't that your testimony? A. Yes, sir.

"Q. And yesterday you testified that you had moved that pot several times? A. Yes, sir.

"Q. And that you knew more about moving that pot than anybody in the shop; now, do you wish to change that? A. I don't think I said I knew more about it than anybody in the shop.

"Q. I believe you said you knew as much about it as anybody in the shop? A. Well, let it go at that.

* * * * *

"Q. Now, Mr. Deen, if you had had another man or two men more to help in lifting that pot, would your foot likely to have been in the position it was when injured? A. If I had had enough help, I would have turned it away from me."

Plaintiff's witness Snow testified:

"Q. Now, with reference to trying to move that pot and trying to empty the babbitt from it *away from you*, could three men have done that job? A. I suppose they could have, maybe.

"Q. Could four men have done it? A. Well, that might be possible, but I don't know whether four men could get to it or not, maybe they could have and maybe they couldn't.

"Q. Could three men have done the job with more ease than two men? A. Yes, sir; I suppose three men would have been better on the job.

"Q. *Could three men have turned it over away from you so the babbitt could fall out?* A. I think so.

* * * * *

"Q. All right. Now, one more question: if you or he had thought it was necessary, could you have gone to the foreman and asked for some more help there. A. Yes, sir.

"Q. Were there men available in that same general area—I don't mean men within ten feet—but men in that general area available to be assigned, or could have been assigned to help you? A. Yes, sir.

"Q. All right. And all it would have caused would have been a delay? Delay getting the job done, is that right? A. Yes, sir.

* * * * *

"Q. Now, Mr. Snow, if you had a third man, you would have been behind the pot, would you not? A. I, myself?

"Q. Yes, sir. In other words, if you had had a third man you would not have all three been in front of it, would you, Mr. Snow? A. No, sir; I wouldn't think so.

DARK PAGE BLE

"Q. Because with a third man, you could have moved it over *from you*, and dumped the babbitt out, could you not? A. Yes, sir; I think so. * * *"

Plaintiff's witness Anderson testified:

"Q. And you know, do you not, Mr. Anderson, that Mr. Deen, in the preceding couple of weeks, had taken that pot out two or three times to braze it; you know that, don't you. A. Yes, sir.

"Q. And put it back? A. Yes, sir.

"Q. And you know, do you not, that he did it with the same equipment that was out there and used on July 12, 1949, don't you? A. Yes, sir.

"Q. All right. And he had gone through exactly the same operation [536] that he had gone through on these other occasions? A. I reckon.

"Q. All right. And you also know that nobody got hurt doing it, don't you? A. Yes, sir." (Emphasis ours.)

[2] We conclude that the verdict and the undisputed evidence show that with the use of the additional help available the pot could have been tilted away from, instead of toward, the men doing the work and the babbitt thus removed with reasonable safety. The testimony of Deen and his witnesses is to that effect. It is undisputed that the babbitt had been thus safely removed three times in the two or three weeks preceding Deen's injury. Deen alleged it was defendant's duty to either furnish tools or sufficient help. His case was submitted to the jury on that theory. Deen thus assumed that if sufficient help had been furnished the babbitt could have been manually removed with safety.

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Sufficient help was available. See Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 979. Under Deen's pleadings and the law, defendant was not required to do both. With sufficient help the babbitt could have been dumped manually with reasonable safety, therefore, there was no need, hence no duty, to also furnish tools. Furthermore, there is no evidence that the additional tools suggested by Deen and Snow were in use, safe or approved. They had not thought of them before the accident. Deen testified that the clamps suggested would have been dangerous. They testified that the only way the babbitt could have been safely removed was either with their suggested appliances or manually with adequate help. Deen testified the safest way was to tilt the pot and let the babbitt fall out. Deen and his witnesses agree that with sufficient help the pot could be tilted away from the men doing the work and the babbitt removed with safety. We sustain appellant's contention that the evidence does not support the finding that defendant was negligent in failing to furnish tools. The defendant was not negligent if it provided the necessary help and Deen voluntarily proceeded to do the work without using it. There were about 60 men working in his department. Deen started to do the work alone, without seeking any assistance and without instructions to do the job then or without help. Snow volunteered to, and did help. Deen had done the same job three times before, in the same way; on those occasions he asked for and obtained adequate help and no injury was suffered. Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977,

979. Deen alleged appellant's duty was to either furnish tools or sufficient help. He was required to prove that defendant did neither. There being a reasonably safe way to dump the babbitt without tools, appellant had no duty to furnish them for that purpose. Judgment should have been rendered for appellant notwithstanding the finding that appellant was guilty of negligence in failing to furnish tools. This decision renders unnecessary a consideration of the other points presented by appellant.

[3] The exceptions stated in Texas Rules of Civil Procedure, rule 434 are not applicable to this record and we are required to render the judgment the distinguished trial court should have rendered. R. C. P. 434; London Terrace v. McAlister, 142 Tex. 608, 180 S. W. 2d 619; Yarbrough v. Booher, 141 Tex. 420, 174 S. W. 2d 47, 150 A. L. R. 1369; Lone Star Gas Co. v. Kelly, Tex. Civ. App., 166 S. W. 2d 191.

The judgment is reversed and judgment rendered for appellant."

JUL 16 1958
JOHN T. FEY, Cle

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 199

EARL R. DEEN, *Petitioner*,

vs.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*.

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

GULF, COLORADO AND SANTA FE RAILWAY, COMPANY, *Respondent*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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EARL R. DEEN, *Petitioner,*

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GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent.*

RESPONDENT'S REPLY TO PETITION FOR CERTIORARI

GULF, COLORADO AND SANTA FE RAILWAY, COMPANY, *Respondent*

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that the petition for certiorari be dismissed, or in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

The decision of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas, to which decision the petition for cer-

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ciorari is directed, is correctly copied in the appendix to the petition herein, and is reported as *Gulf, Colorado and Santa Fe Railway Company vs. Deen*, 275 SW (2d) 529. Respondent cannot accept as accurate the petitioner's "Statement of the Matter Involved" beginning on page 2 of the petition herein. In that portion of the brief and throughout same petitioners have misconstrued the decision, the opinion of the Court of Civil Appeals, and the basis for it. The best evidence of the decision of the Court of Civil Appeals, the basis for the decision, and the facts is the opinion of the Court of Civil Appeals, and neither the attorney for petitioner nor the attorney for the respondent can change that opinion, and we are in general willing to let the opinion of the Court of Civil Appeals "speak for itself", and therefore only make a brief summary to correct the erroneous impression which might be created by petitioner's statement.

Petitioner's repeated statements that he was deprived of a jury trial are untrue. Petitioner had the option of filing this case in the United States District Court or in the District Court of the State of Texas. He chose the State Court and filed therein a petition in accordance with the statutes and rules of procedure of the State of Texas. The defendant answered in compliance with the Texas practice. The parties amended in accordance with Texas practice, and announced ready and tried the case before a jury. Under Texas practice civil suits are tried before juries, and instead of a general charge the jury's decision is solely embodied in answers to special issues which

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are in the form of questions. Such charge containing the special issues was submitted to the Texas jury, and they returned their answers to such issues. Under Rule 301 of the Texas Rules of Civil Procedure (copied verbatim in the appendix hereto) the court's judgment is required to conform to the pleadings, the evidence, and the jury's verdict.

The jury's verdict was for the plaintiff on some issues and for the defendant on some issues, and the trial court, in applying Rule 301, decided that the essential issues had been found in favor of the plaintiff and rendered judgment accordingly. Defendant appealed to the Court of Civil Appeals, and that court, applying Rule 301, which to repeat, required that the judgment conform to the pleadings, the evidence, and the jury's verdict, determined that under the pleadings, the evidence, and the verdict, the essential issues had been answered in favor of the defendant, and consequently reversed and rendered the case.

Plaintiff had his jury trial, and the jury found the essential issues of fact against him, and that is what the Court of Civil Appeals decided.

The facts themselves are so simple and stated in such detail in the opinion of the Court of Civil Appeals that all that needs to be repeated here is that plaintiff, who is in charge of the operation, got his leg broken when the hardened babbit fell out of the pot he was turning over. A babbit pot looks considerably like an old-fashioned kitchen sink, and plaintiff had gotten it out of the furnace and had it on the ground. There was no hurry, and men would

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be along in a few minutes to help him, but the plaintiff decided to empty the babbitt out of the pot, and although he had gone through the same operation many times before with adequate help and although there was plenty of help available to him, he and one other man who was near by turned over the pot and the babbitt fell out on plaintiff's leg. Plaintiff admitted that there was nothing wrong with the operation except that he had put his leg in the way, and that he had done it before with plenty of help and there was no danger incident to doing it that way.

One additional statement is probably essential, and that is that in spite of some of the implications of petitioner's language this is *not a case* where the employer furnish two ways to do the work, one safe and one less safe or dangerous. The employer only furnished one way to do the work, and that was manually with adequate help. Deen was not given any alternative; he was only given the one way to do the work, to-wit, by hand with help. As the Court of Civil Appeals construed the jury's finding, the jury found that defendant did not fail to furnish adequate help, and that such help was available to Deen. No one had ever heard of any other method of flopping over a pot, vat or sink, and no other method was furnished. The only claim as to tools was the testimony of the plaintiff (as quoted by the Court of Civil Appeals) that some type of clamp might be manufactured to clamp on the pot so that the hoist (which was furnished) could be attached to the pot, and then it could be handled by one man. Plaintiff admitted that

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such procedure would be dangerous, whereas he further admitted that turning over the pot with plenty of help available was safe.

Let us repeat that no one has denied Deen a jury trial. He got a jury trial, and the jury found the essential issues against him. There is no provision of the Federal Employer's Liability Act or the Constitution of the State of Texas or the United States that guarantees a railroad employee that a judgment will be entered in his favor if a jury find any issue, however immaterial, in his favor.

JURISDICTION

While there is no issue but that this action was brought under the Federal Employer's Liability Act, by a railway employee engaged in interstate commerce, against an employer engaged in interstate commerce, that admission does not create either jurisdiction or grounds for this court exercising its discretion in granting certiorari. This action was brought by the plaintiff in the District Court of the State of Texas. Procedure is governed by the rules and statutes of the State of Texas. One of the applicable rules is Rule 301, Texas Rules of Civil Procedure, which is copied in full in the appendix hereto, the first sentence of which reads as follows:

> "Rule 301. Judgments. The judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or in equity."

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Under this rule (which is merely Article 2211 of the Revised Civil Statutes of the State of Texas of 1925 continued in the Rules of Civil Procedure), the trial court or, on appeal, the Court of Civil Appeals must disregard the answer to any special issue not supported by the pleadings, not supported by the evidence, or which becomes immaterial in light of the other special issues.

Socony-Vacuum Oil Co. vs. Aderhold, 150 Tex. 292, 240 SW (2d) 751;
Whittenberg vs. Miller, 139 Tex. 586, 164 SW (2d) 497;
Sproles vs. Rosen, 126 Tex. 51, 84 SW (2d) 1001;
Starr vs. Ferguson, 140 Tex. 80, 166 SW (2d) 497;
Gardner vs. Goodwin Wholesale Grocery Co., 133 Tex. 423, 256 SW 911.

If the Texas Court of Civil Appeals correctly applied the Texas Rules of Civil Procedure to the Texas form of pleadings, the evidence introduced under the Texas practices, and the special issue verdict returned in accordance with Texas practice, then both its decision and the judgment in this case is correct. On the other hand, if the Texas Court of Civil Appeals incorrectly applied the Texas Rules of Civil Procedure to Texas pleadings, Texas special issues, and to a Texas judgment, such error does not constitute the basis for jurisdiction or the granting of certiorari herein.

McGoldrick vs. Gulf Oil Corp., 309 U.S. 2, 60 S. Ct. 375, 84 L. Ed. 536;

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Stemberg vs. Georgia, 343 U.S. 591, 72 S. Ct. 834, 96 L. Ed. 1130;
Bechtel vs. Wilson, 204 U.S. 36, 27 S. Ct. 243, 51 L. Ed. 361;
Benson vs. M. K. & T. Ry. Co., 200 SW (2d) 233 (Cert. Den.), 332 U.S. 830, 92 L. Ed. 403, 68 S. Ct. 206.

ON THE MERITS

The Court of Civil Appeals did not hold contrary to the statute (45 U.S.C.A. Sec. 51 et sec.) or any decision of this court. The Court of Civil Appeals said that the statute and the decisions of this court require that the employee obtain a jury finding of negligence on the part of the employer proximately causing any damage for which he sues.

This was a simple case, a simple job of work to be done, there was no hurry, and plaintiff was the man in charge. All he had to do (sooner or later) was to get the babbitt out of the old worn-out pot, which was safely on the ground, no danger to anyone and in nobody's way. The employer had provided *only one method* for doing the work, and that was to manually turn over this pot. Nothing complicated about it, and all that was involved was the same things that were involved if an old-fashioned kitchen sink was on the floor and someone wanted to flop it over so that it would be top down on the floor. The method provided was for five or six men to get around and behind and turn it over away from them, and when it came face down on the floor, of course, the

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babbitt would drop to the floor and then the pot would be flopped on off.

The jury found that the defendant did not fail to furnish enough men to turn the babbitt pot over with safety. Due to the method of submitting special issues, the actual finding was not word for word that, but that is the substance of it and that is the way the Court of Civil Appeals construed it. To put it in the affirmative, the jury found that the defendant furnished enough men to do the work with reasonable safety. That was the only method provided by the defendant.

In this case the jury found against the plaintiff by finding that defendant had furnished a reasonably safe way to do the work. Where the employer has furnished a reasonably safe way to do the work, it cannot be charged with negligence because he did not furnish an additional safe way to do the work. As pointed out in the opinion of the Court of Civil Appeals, the petitioner here recognized that rule of law in his pleadings when he alleged that it was our obligation to furnish *either* adequate help to do the work in safety or proper tools to do the work in safety. The Court of Civil Appeals' construction of plaintiff's pleading and its statement of the law as contained in the following quotation from that opinion (275 SW (2d) 531):

> "Deen's complaint was, in substance, that it was the company's duty to do one of two things, either furnish tools or additional help to remove the babbitt. Deen seems to recognize in his pleadings the correctness of appellant's proposition

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that the company did not have a duty to furnish more than one reasonably safe way to do the work.

(1) We shall now attempt to determine the correctness of appellant's contention that the verdict and the undisputed evidence show that the babbitt could have been removed with reasonable safety with the additional help available to Deen. If this contention is correct, the railway company had furnished one reasonably safe way to do the job and it had no duty to furnish a second reasonably safe way, that is, to furnish Deen with tools. In other words, if there was no need for tools the railway company had no duty to furnish them."

The Court's statement of the rule of law is supported by the cases it cites, to-wit:

Western Union Telegraph Co. vs. Coker, 146 Tex. 190, 204 SW (2d) 977, 979;

Louisville & N. R. Co. vs. Davis, 6 Cir., 75 F. (2d) 849;

August vs. Texas & N. O. R. Co., Tex. Civ. App., 265 SW (2d) 148, 153 (RNRE);

Armstrong vs. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ. App., 233 SW (2d) 942, 946 (RNRE);

Wolfe vs. Henwood, 8 Cir., 162 F. (2d) 998, 1000;

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McGivern vs. Northern Pac. Ry. Co., 8 Cir., 132 F. (2d) 213, 217;

Thompson vs. Pennsylvania R. Co., 6 Cir., 88 F. (2d) 148, 150;

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Johnson vs. Pulliam, Tex. Civ. App., 161 SW (2d) 589 (RWM).

Additional authorities appear in the appellant's brief filed in the Court of Civil Appeals (which has been filled herein), page 38 to 49 inclusive, and page 57 to 72 inclusive.

We have repeated twice, and repeat again, that the employer in this case only furnished one way to do the work, and that was manually by turning the pot over by hand. The jury found that the employer furnished enough help that the work could be done manually with reasonable safety. This is not a case, although the petitioner (see petition, p. 20 and 21) by citing *Wilkerson vs. McCarthy*, 93 L. Ed. 497, 366, U.S. 53, and *Virginia Ry. Co. vs. Viars* (4th Cir.), 193 Fed. (2d) 547, implies that it is, where the defendant furnished two ways to do the work, one safe and one unsafe. In the Wilkerson case the employer had furnished a longer and safer route, and a short and dangerous route. In the Viars case several ways of doing the work had been furnished, and one included dynamite, which method was found to be dangerous. Deen was just furnished one way to do the work, that is, manually with plenty of help, and the jury found, contrary to his evidence and his contentions, that the railway company furnished him adequate help to do the work in safety. The petitioner here does not challenge the sufficiency of the evidence supporting the jury's finding that the defendant furnished enough man power to do the work in safety.

Therefore, in order to hold that the Court of Civil Appeals was wrong, this court must decide:

> "Where the only method of doing the work provided by the employer is manual, and a jury, on adequate evidence, finds that sufficient man power was furnished by the employer to do the work in reasonable safety, the employer may nevertheless be held liable for not devising or designing some untried equipment which may be safe or might be dangerous and which might have enabled the plaintiff to perform the same job alone."

The plaintiff was not deprived of any jury trial; he got a jury trial, and the jury found against him on essential issues. The Court of Civil Appeals did not decide the case on any new principle of law, on any principle of law contrary to anything that this court has held, nor contrary to either the letter or the spirit of any statute. The case is a very simple one, where a Texas trial court erred in determining which special issues were immaterial in the light of the pleading, the evidence, and the law, and a Texas Court of Civil Appeals disagreed with that trial court and held that the jury's findings on special issues, which under the pleadings, the evidence and law were controlling, required a judgment for the defendant.

CONCLUSION

It is respectfully submitted that the Court of Civil Appeals opinion, against which this petition is directed, more accurately states the facts involved, the pleadings of the parties involved, and the holding and decision of such Court of Civil Appeals than does petitioner's statement as filed herein.

As reflected by the opinion of the Court of Civil Appeals in this case, this is simply a case where the employee had a jury trial and the jury found against him on the essential issues. No federal question is involved, and no error has been committed.

It is respectfully submitted that the petition for a writ of certiorari should be denied or dismissed.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, *Respondent*

Respectfully submitted

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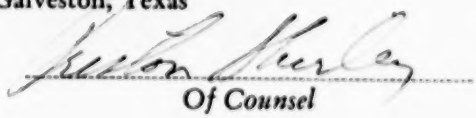

Of Counsel

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I certify that a copy of the foregoing respondent's reply to petition for writ of certiorari has been mailed on the 12 day of July, 1956, to the petitioner's attorneys, as follows: to Mr. David C. McCord, 519 Mercantile Bank Building, Dallas 1, Texas; and to Messrs. Johnson, Guthrie and Stanfield, 1608 Mercantile Bank Building, Dallas 1, Texas.

Preston Shirley

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APPENDIX

Vernon's Annotated Texas Rules of Civil Procedure, Vol. 2, p. 346:

"Rule 301. Judgments

"The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors."

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 230

EARL R. DIEHL,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District at Eastland

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BRIEF ON THE MERITS

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